No. 82 - 1868

SUPREME COURT OF THE UNITED STATES

October Term, 1982

KLAMATH-LAKE PHARMACEUTICAL ASSOCIATION, an Oregon non-profit corporation, on behalf of its assignors,

Petitioner,

v.

KLAMATH MEDICAL SERVICE BUREAU, an Oregon non-profit corporation, and KLAMATH BUREAU PHARMACY, INC., a now-dissolved Oregon profit corporation,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is dispensing of prescription drugs under a prescriptive drug benefit the "business of insurance" under the McCarran-Ferguson Act exemption to the antitrust laws?

2. Is a health care contract provision requiring a subscriber with a prescriptive drug benefit to obtain prescription drugs from the provider or its exclusive designated pharmacy, or lose the benefit, an illegal "tying" agreement?

3. Is requiring a subscriber with a prescriptive drug benefit to obtain prescriptive drugs only from the health care provider or its exclusive pharmacy, or lose the benefit, "coercion, intimidation, or boycott" under the McCarran-Ferguson Act exemption to the antitrust laws?

4. Did the health care provider lose its McCarran-Ferguson Act exemption from the antitrust laws by acting in concert with a non-insurance company?

5. Did the courts below deprive Petitioner of its right to trial by jury by weighing the conspiracy and boycott evidence, instead of deciding whether there was a genuine issue of material fact?

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Petitioner, Klamath-Lake Pharmaceutical Association, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 4, 1983, and amended April 1, 1983.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 701 F.2d 1276, decided March 4, 1981, and amended April 1, 1983, and at 1983-1 TRADE CASES Pgh. 65,254 (9th Cir. 1983) The opinion of the district court granting respondents' summary judgment motion is reported at 507 F. Supp. 980 (D. Ore. 1981). The Court of Appeals for the Ninth Circuit affirmed the trial court on the issues on appeal in this petition. The opinions of the Court of Appeals and the District Court appear in the Appendix hereto.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The judgment of the Court of Appeals for the Ninth Circuit was entered March 4, 1983 and amended April 1, 1983. On March 18, 1983, the Court of Appeals denied Petitioner's motion for an extension of time to file its petition for rehearing. This petition was filed within 90 days of March 4, 1983 and April 1, 1983. The petition was due June 2, 1983.

STATUTES AND OTHER AUTHORITIES

Petitioner relies on Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2; Section 4 of the Clayton Act, 15 U.S.C. § 15, the following sections of the McCarran-Ferguson Act, 15 U.S.C. §§ 1012 and 1013(b); F.R. Civ. P. Rule 56, and the Seventh Amendment to the Constitution of the United States, reproduced in the Appendix hereto.

STATEMENT OF THE CASE

The Parties:

Petitioner is an Oregon non-profit corporation composed of owners and operators of retail pharmacies in thinly-populated Klamath and Lake counties in southeastern Oregon and the adjacent Tulelake area of northern California.

Various of its members assigned their antitrust claims against respondents to Petitioner, and validity of the assignments was upheld (App. 6A).

Respondent Klamath Medical Service Bureau (K.M.S.B.) is an Oregon health care provider engaged in the health care and retail pharmacy business in Klamath and Lake counties, Oregon and the Tulelake area of California.

Respondent Klamath Bureau Pharmacy, Inc. (Pharmacy, Inc.) is a now-dissolved Oregon for-profit corporation. It had an exclusive contract to dispense prescription drugs to K.M.S.B. subscribers.

In 1976, K.S.M.B. acquired Pharmacy, Inc.'s as-

sets and operates the former Pharmacy, Inc. pharmacy in its original location: K.M.S.B. headquarters in Klamath Falls, Oregon.

The Restrictive Practice:

With minor exceptions, K.M.S.B. subscribers with a prescriptive drug benefit must obtain their prescriptive drug benefits exclusively from the K.M.S.B.-designated pharmacy. Such subscribers lose their prescriptive drug benefit if they patronize a competing pharmacy.

The typical restrictive program mandates that:

> "K.M.S.B. will supply only through the Bureau Pharmacy prescriptive drugs prescribed by a licensed physician and surgeon * * *." (Complaint 6, 1-4)

K.M.S.B. contracted with Pharmacy, Inc., under which Pharmacy, Inc. was the sole designated pharmacy for K.M.S.B. subscribers with a prescriptive drug benefit.

All Pharmacy, Inc. stockholders were K.M.S.B. physicians and the boards of directors of the two respondents were virtually identical.

Pharmacy, Inc. derived substantial profits from its contract with K.M.S.B.

Pharmacy, Inc. stockholders received substantial profits on their investments from sale of Pharmacy, Inc. assets to K.M.S.B. and dispensing of prescription drugs by K.M.S.B. subscribers.

Effects of the Restrictive Practice:

Since their entries into the retail prescription drug market, respondents filled an ever-growing number of prescriptions in the relevant market, and captured an ever-larger significant percentage of the relevant market:

1974	33,440 prescriptions
1975	43,901 prescriptions
1976	55,413 prescriptions
1977	60,037 prescriptions
1978	77,541 prescriptions.

In 1978 K.M.S.B. dispensed an estimated 50% or more of all prescription drugs dispensed in the relevant market. As more employers provided the "fringe" benefit of prepaid health care with a prescriptive drug benefit, K.M.S.B. increased its share of the prescription drug dispensing in the relevant market.

App. 3A states the effect of the restrictive practice:

> "* * * Provider's prescription drug program cut substantially into the business of local pharmacies. Provider's subscriptions more than doubled between 1974 and 1978, from 33;440 to 77,541; several other pharmacies went out of business and the sales of others dropped rapidly. * * * "

K.M.S.B.'s competitors went out of business because they no longer could compete with respondents for the prescription drug business of thousands of K.M.S.B. subscribers with a prescriptive drug benefit.

Whenever a "steady" customer of Petitioner's as-

signors and other community pharmacies acquired a K.M.S.B. prescriptive drug benefit, the customer had a choice:

(1) continue to patronize the pharmacy and lose the benefit he or his employer paid for, or

(2) use the prescriptive drug benefit by ceasing to obtain prescription drugs from the retail pharmacy.

To receive the prescriptive drug benefit, the customers abandoned the competing retail pharmacies by the thousands.

Insurance Commissioner Does Not Regulate Prescriptive *Drugs:*

The Oregon Insurance Commissioner and the Insurance Division of the Oregon Department of Commerce did not regulate the agreement between K.M.S.B. and Pharmacy, Inc. and did not regulate prescriptive drug dispensing by a health care provider:

> "Q (By Mr. Kane) To what extent is your office and the Insurance Division regulating dispensing of prescription drugs by health care providers who provide a prescriptive Drug benefit?
>
> "A *None to my knowledge.*"
>
> (May 31, 1939 deposition of Oregon Insurance Commissioner W. W. Fritz 18, 21-25).

> "Q * * * And in the period of time that you have been with the Department of Commerce or the Insurance Division, what regulation have you

engaged in concerning prescriptive drug benefit provisions of a health care or insurance policy?

"A *We have to my knowledge none.*"
(Id. at p. 33, 5-13) (emphasis added)

The McCarran-Ferguson Act was never intended to preempt Federal antitrust laws in the face of superficial, ineffective state regulation. *Crawford* v. *American Title Insurance Co.*, 518 F.2d 217, 235-236, Godbold, dissenting, (5th Cir. 1975).

The Agreement Between Respondents Is Outside the McCarran-Ferguson Act

Respondents' Ninth Circuit brief at pp. 21-22 and 26 conceded that the prescriptive drug agreement between respondents was not protected by the McCarran-Ferguson Act:

> "Defendants have not and do not contend that the provider agreements between the two of them, between September, 1974, and June, 1967, was part of the business of insurance." (D.B. 21)

Appellant's Rule 56 affidavits raised numerous issues of material fact. None were contradicted, yet the judgment appealed from ignored the issues *inter alia*, of motive and intent.

STATEMENT OF REASONS THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I

The Opinion Conflicts with Decisions of This Court

Group Life & Health Insurance Co. v. *Royal Drug Co.*, 440 U.S. 205, 214 (1979) held that pro-

viding prescription drugs under a prepaid health care contract was not the "business of insurance."

K.M.S.B.'s third-party prescription agreement with Pharmacy, Inc. is the same type of agreement *Group Life* held was not the business of insurance under the McCarran-Ferguson Act.

The judgment appealed from thus contradicts *Group Life* and should be reversed.

II

St. Paul Fire & Marine Ins. Co. v. *Barry*, 438 U.S. 531 (1978) applied the broad meaning of "boycott" to the McCarran-Ferguson Act.

In the appeal at bar there is boycott in the form of concerted refusal to deal.

K.S.M.B. subscribers with a prescriptive drug benefit were compelled by economic self-interest to refuse to deal with competing pharmacies on pain of losing their prescriptive drug benefit.

The effective economic compulsion was that K.M.S.B. would not pay the prescriptive drug benefit if the subscriber purchased prescription drugs from other than the K.M.S.B.-designated pharmacy.

The K.S.M.B.-mandated refusal to deal destroyed competition in the relent market by depriving pharmacies of the bulk of their customers.

Thus competition was and is stifled and destroyed because competitors driven out of business by concerted refusal to deal cannot compete with K.M.S.B.

III

The judgment appealed from contradicts this Court's decisions that the moving party is entitled to summary judgment only if there is no genuine issue as to any material fact and discourages summary judgment where intent and motive are factors. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).

Instead, the courts below weighed the evidence, *e.g.*, App. 26A:

> "* * * There is insufficient evidence * * *. As Association has *not proven* this charge * * *." (emphasis added)

Weighing the evidence, instead of determining existence of an issue of material fact, deprived Appellant of its Seventh Amendment right to trial by jury on the boycott and attempt to monopolize issue.

There is an Intra-Circuit Conflict on the "Tying" Issue.

There is a substantial conflict between the Fifth and Ninth Circuits on the "tying" issue.

The case at bar conflicts with *Hyde* v. *Jefferson Parish Hospital District No. 2*, 686 F.2d 286 (5th Cir. 1982), *cert. granted* March 7, 1983 *sub nom. Jefferson Parish Hospital District No. 2* v. *Hyde*, Dkt. 82-1031.

Hyde held that the hospital had sufficient market power in the tying product for its hospital services to coerce purchase of the tied product — anesthesia serv-

ices — so as to make its exclusive contract with a medical corporation to provide anesthesia services an illegal "tying" arrangement.

In the case at bar the prescription drugs are dispensed pursuant to a contract tying two separate products — insurance, a service, and prescription drugs, a product.

Dispensing of prescription drug products is not a traditional or recognized function of an insurer, does not reduce "risk," and is therefore not "insurance" or "the business of insurance." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, supra; *Union Labor Life Ins. Co.* v. *Pireno*, — U.S. —, 102 S. Ct. 3002, 3011 (1982).

The case at bar is in conflict with *F.T.C.* v. *Dixie Finance Co.*, 695 F.2d 926, 931 (5th Cir. 1983): "* * * under the dictates of *Royal Drug* we are required to limit our determination as to the 'business of insurance' to the discrete conduct in question."

There is an Inter-Circuit Conflict.

The Ninth Circuit decision at bar conflicts with three recent Ninth Circuit decisions.

Portland Retail Druggists Association v. *Kaiser Foundation Health Plan*, 662 F.2d 641, 648 (9th Cir. 1981) held that a prescriptive drug provision similar to the one at bar "is a classic tie about which, if proved, appellants could complain * * *."

United States v. *Title Insurance Rating Bureau of*

Arizona, 700 F.2d 1247, 1252 (9th Cir. 1983) held that the escrow services of a title insurer were not the "business of insurance" and that filing of the escrow service rates with Arizona authorities did not establish antitrust immunity.

Hahn v. Oregon Physicians Service, 689 F.2d 840, 844 (9th Cir. 1982) held that insurance contract provision that "insureds are required to obtain certain podiatric services from medical doctors" was outside the McCarran Act exemption:

> "* * * arrangements whose primary impact is on competition in markets other than that for insurance do not fall within the exemption. * * *"

The Judgment Raises Substantial Issues of Public Policy.

The judgment allows "cartelization" by insurers and forecloses competition in the monopolized market, *e.g.*, auto insurers require motor vehicles to be repaired only at their unregulated affiliated repair shops.

The decision authorizes profitable self-dealing between nonprofit insurers and "designated" profit corporations owned or controlled by the insurers.

Millions of insureds can be deprived of their freedom of choice to obtain products at a competitive price covered by insurance, *e.g.*, car repairs.

"Tying" arrangements are a per se violation of the Sherman Act. *Northern Pac. R. Co.* v. *United States*, 356 U.S. 1, 6 (1958).

This Court considers "tying" a substantial federal question: on March 7, 1983 this Court granted certiorari to *Jefferson Parish Hospital District No. 2* v. *Hyde*, Dkt. 82-1031, like the case at bar, a "tying" case.

Allowing the petition would serve the national interest in effective enforcement of the antitrust laws.

Respectfully submitted

HENRY KANE
Counsel for Petitioner

June 2, 1983

I hereby certify that I served the foregoing

on

attorney for on the day of

, 19 , by mailing to him three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in a sealed envelope addressed to the said attorney at

which is his regular office address, or his address as last given by him on a document which he has filed in the within entitled cause and served on me; said sealed envelope was then deposited in the United States post office at

, Oregon, on the day last above mentioned, with the postage thereon fully paid.

Attorney for

Service of the within

is hereby accepted in ,Oregon, this

day of , 19 ,

by receiving three copies thereof.

Attorney for